

A RE PUAN SRI MONA KISHU THIRATRAI,
EX P AFFIN BANK BHD

HIGH COURT MALAYA, KUALA LUMPUR
KANG HWEE GEE J

B [BANKRUPTCY NO: D8-29-3378-2004]
23 JANUARY 2007

C ***BANKRUPTCY: Receiving and adjudication orders - Appeal against - Proof of debt - Whether proved - Failure to satisfy bankruptcy notice - Whether act of bankruptcy committed by judgment debtor - Whether debtor could offer composition - Whether verifying affidavit annexed to petition - Whether petition ineffective and bad - Whether appeal dismissed***

This was an appeal by the judgment debtor against the decision of the senior assistant registrar in making a receiving order (RO) and adjudication order (AO) against her. The RO and AO arose from a judgment debt of RM10,225,753.42 obtained by the judgment creditor from the High Court Kuala Lumpur and pursuant to a judgment notice issued by the judgment creditor. The grounds of appeal were: (1) the debt had not been proved at the hearing of the petition before the senior assistant registrar, the judgment debtor having served a notice under r. 117 of the Bankruptcy Rules 1969 disputing the debt and the act of bankruptcy; (2) the adjudication order should not have been made as was done in this case, immediately after the receiving order was made and that the senior assistant registrar must take a further step of asking whether the debtor had properties or could offer composition. The judgment creditor opposed this appeal on the following grounds: (i) the judgment debtor was incompetent to raise the said issues because during the hearing before the senior assistant registrar, only one technical issue on the failure of the judgment creditor to attach the affidavit verifying petition with the creditor's petition was raised and as such, the judgment debtor was estopped from raising other issues; (ii) it was not necessary to provide any additional proof of debt at the hearing of the petition before the senior assistant registrar as it had already been provided by the affidavit verifying petition; (iii) in the petition before the senior assistant registrar a supplementary affidavit was filed to say that the affidavit verifying the petition had been stapled to the creditor's petition and served on the judgment debtor and (iv) on the issue of whether the adjudication order

should be made only after the court had asked the judgment debtor whether she had any properties and secondly whether she could offer any composition to the judgment creditor, s. 24 of the Bankruptcy Act 1967 should be referred to.

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Held (dismissing the appeal):

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(1) A judgment of the court is conclusive of the debt owed to the judgment creditor. In the absence of any evidence that those sums were not owed the senior assistant registrar was entitled not to stay the proceedings under s. 6(5) of the Bankruptcy Act 1967. She was entitled to find that the sum of RM10,225,753.42 was due and owing by the judgment debtor and that by the judgment debtor's failure to satisfy the bankruptcy notice after the expiry of seven days, an act of bankruptcy had been committed by the judgment debtor. The proof of debt had been provided by the bankruptcy notice itself. The senior assistant registrar was entitled to make the receiving order and the adjudicating order. (para 6)

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(2) Onus is on the judgment debtor to inform the court at the hearing that she could make a composition with her creditor or creditors. The judgment debtor herein did not provide any such information that she had the means to settle. In her notice of intention to oppose the petition under r. 117 of the Bankruptcy Rules 1969, she merely disputed the debt and the act of bankruptcy without condescending to particulars. (para 4)

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(3) The purpose of Form 11 was merely to bring to the notice of the judgment debtor that the verifying affidavit had been annexed to the petition. If indeed the verifying affidavit and the petition had been brought to the notice of the judgment debtor that purpose had been achieved. A minor infraction (even if proven) did not in this case make the petition ineffective and bad. (para 6)

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Case(s) referred to:

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Asia Commercial Finance (M) Bhd v. Karwal Teliti Sdn Bhd [1995] 3 CLJ 783 SC (**refd**)

Ooi Thean Chuan v. Banque Nationale de Paris [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160 HC (**not foll**)

Re Mat Shah Safuan, ex p United Asian Bank Bhd [1991] 2 MLJ 48 (**refd**)

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Re Sharma Kumari Shukla, ex p Dato' Abdullah Hishan Hj Mohd Hashim (No 2) [2000] 6 CLJ 364 HC (**refd**)

Re Tan Sri Kishu Tirathrai, ex p Affin Bank Berhad (unreported) (**refd**)

A Legislation referred to:

Bankruptcy Act 1967, ss. 3(1)(i), 6(2), (5), 24
Bankruptcy Rules 1969, rr. 117
Rules of the High Court 1980, O. 56 r. 1(3A)

For the judgment creditor - R Tharmy; M/s Shook Lin & Bok

B *For the judgment debtor - T Gunaseelan; M/s Gunaseelan & Assoc*

[Editor's note: See also the case of Re Tan Sri Kishu Tirathrai; ex p Affin Bank Bhd [2007] 7 CLJ 270 for an opposing view]

Reported by Suhainah Wahiduddin

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JUDGMENT

Kang Hwee Gee J:

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This is my oral judgment: (ex-tempore)

E **[1]** This is an appeal by the judgment debtor against the decision of the senior assistant registrar in making a receiving order (RO) and adjudication order (AO) against her on 15 September 2006.

F **[2]** The RO and AO arose from a judgment debt of RM10,225,753.42 obtained by the judgment creditor from the High Court Kuala Lumpur and pursuant to a judgment notice issued by the judgment creditor.

[3] The grounds of appeal are as follows:

G 1. The debt had not been proved at the hearing of the petition before the senior assistant registrar, the judgment debtor having served a notice under r. 117 disputing the debt and the act of bankruptcy.

H See bankruptcy notice *Re Tan Sri Kishu Tirathrai v. Ex Parte Affin Bank Berhad* (Unreported) per Abdul Alim Abdullah JC of Kuala Lumpur High Court:

I The ground advanced by counsel for the Judgment Debtor is seen in some compelling and well founded authorities. It is well reasoned where seen in *Re Teoh Thean Peng, Ex Parte D & C Leasing Sdn. Bhd.* [1993] 1 AMR 20 where Dato' KC Vohrah J (as he then was) drew attention that the affidavit of verification on which the petition is filed cannot

be used upon the hearing of the bankruptcy petition. This observation is self explanatory and one based on established English authorities which laws, namely the Bankruptcy Act 1952 (now replaced by the Insolvency Act 1986), and our Bankruptcy Act 1967 is in *pari materia*, the latter modeled on the former. Our Malaysian case law cited herein finds support in the English authority of *Re A Debtor* (7 of 1910) 1910 2 KB 59 where Vaughan Williams LJ in stating that the affidavit is in effect for the purpose of getting leave to file the petition in bankruptcy, went on the say:

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The affidavit which is used at the time when the petition is filed is an affidavit which cannot be used upon the hearing of the bankruptcy petition.

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A very relevant passage from Williams and Muir Hunter on *The Law And Practice In Bankruptcy* (19th Edition) at page 56 will make plain and illuminate the essential point in the proof of debt of the Petitioning Creditor:

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Since bankruptcy affects not only the debtor and his creditors, but also the general public, the court has a duty to see that all the requirements of the Act and Rules have been observed (*Re a Debtor* (591 of 1934) 1935 Ch 353). The petitioning creditor's debt must be proved not only to have existed at the date of the act of bankruptcy and at the time of the presentation of the petition, but also to exist at the hearing and down to the making of the receiving order. (emphasis added).

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Submits: The debt ought to be proved right up to the time the receiving order is made as certain sums may have been made to the judgment creditor before the hearing. We have given notice that we dispute to an act of bankruptcy.

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2. The adjudication order should not have been made as was done in this case, immediately after the receiving order was made. The senior assistant registrar must take a further step of asking whether the debtor has properties or can offer composition.

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See observation of Abdul Alim Abdullah JC in *Re Tan Sri Kishu Tirathrai v. Ex Parte Affin Bank Berhad*.

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A [4] The judgment creditor opposed this appeal on the following grounds:

B 1. The judgment debtor is incompetent to raise the issues that he has raised just now as during the hearing before the senior assistant registrar he had only raised one technical issue on the failure of the judgment creditor to attach the affidavit verifying petition with the creditor's petition. As such the judgment debtor is now estopped from raising any other issues. See *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 per Peh Swee Chin SCJ at Held (2):

D There are two kinds of estoppel per *rem judicatum*, ie cause of action estoppel and issue estoppel. The cause of action estoppel prevents reassertion of a cause of action which has been determined in a final judgment by the same parties. On the other hand, the issue estoppel prevents contradiction of the correctness of a final judgment by the same parties in a subsequent proceeding. Further, the parties are also prevented from asserting a cause of action or issue which should have been brought forward in the earlier action, but was not, whether deliberately or inadvertently.

E See also O. 56 r. 1(3A) of the Rules of the High Court 1980:

F (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:

G (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and

(b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

H 2. It is not necessary to provide any additional proof of debt at the hearing of the petition before the Senior Assistant Registrar as s. 6(2) Bankruptcy Act 1967 merely says at the hearing there should be proof of the debt as opposed to proof of debt at the date of hearing. Proof of debt had already been provided by the affidavit verifying petition also by the fact of

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the judgment. See *Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Haji Mohd Hashim (No. 2)* [2000] 6 MLJ 391 at Held (1):

The judgment which forms the basis of the bankruptcy proceeding is the proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition was sufficiently proven by referring to the affidavit of service (encl 36). As such, there was sufficient proof to satisfy the requirement of s. 6(2) of the Act (see p 394B-C). Rule 120 refers to instances where the petition is dismissed due to non-appearance of the creditors. In the present case, the petitioner was represented by his counsel (see p 396B).

3. In the petition before the senior assistant registrar we had, before the judgment, filed in a supplementary affidavit to say that the affidavit verifying the petition had been stapled to the creditor's petition and served on the judgment debtor.
4. On the issue of whether the adjudication order should be made only after the court asked the judgment debtor whether she has any properties and secondly whether she can offer any composition to the judgment creditor – see s. 24 of the Bankruptcy Act 1967 which reads as follows:

Adjudication of bankruptcy

24. (1) At the time of making a receiving order the court shall adjudge the debtor bankrupt unless the debtor can show to the satisfaction of the court that he is in a position to offer a composition or make a scheme of arrangement satisfactory to his creditors; provided that when a receiving order is made against a firm in the firm's name the court shall not adjudge any person bankrupt as a member of the firm unless such person is proved to the satisfaction of the court to be a partner by his own admission or by evidence on oath.

(2) The court may at any time, on the application of the debtor himself, by petition in writing, unstamped, to be forthwith filed, adjudge him bankrupt and at the same time make a receiving order against him, and such application may be made without notice.

A (3) Where a receiving order is made against a debtor,
if the creditors at the first meeting or any adjournment
thereof resolve by ordinary resolution that the debtor be
B adjudged bankrupt or pass no resolution, or if the creditors
do not meet, or if a composition or scheme is not accepted
or approved in pursuance of this Act within fourteen days
after the conclusion of the examination of the debtor or
such further time as the court allows, the court shall
adjudge the debtor bankrupt.

C (4) When a debtor is adjudged bankrupt his property
shall become divisible among his creditors and shall vest in
the Official Assignee.

D (5) Notice of every order adjudging a debtor bankrupt,
stating the name, address and description of the bankrupt
and the date of the adjudication, shall be published in the
Gazette and advertised in a local paper as prescribed, and
the date of the order shall for the purposes of this Act be
the date of the adjudication.

Submits: Onus is on the judgment debtor to inform the court
at the hearing that she can make a composition
E with her creditor or creditors. In our case the
judgment debtor did not provide any such information
that she has the means to settle. In her notice of
intention to oppose the petition under 117 of the
F Bankruptcy Rules 1969 she merely disputes the debt
and the act of bankruptcy without condescending
to particulars.

See *Re Mat Shah bin Safuan, ex p United Asian Bank Bhd*
[1991] 2 MLJ 48 per Siti Norma Yaakob J (as she then was)
G at 50:

Coming to the petition itself, the debtor contends that the
court is only empowered to make a receiving order
pursuant to the prayer contained in the first paragraph of
the petition and also pursuant to s. 6(2) of the Act.
H Consequent upon such an order, a general meeting of
creditors will be held under s. 15(1) of the Act for the
purpose of considering whether a proposal for a compo-
sition or scheme of arrangement shall be entertained and
under r. 150(2) once a resolution for the acceptance of the
I composition or arrangement has been passed by the
creditors at the first meeting and before the holding of a
subsequent meeting to confirm the resolution, the debtor

informs the Official Assignee in writing that he is unable to carry out the proposed composition or scheme or if at the subsequent meeting the proposed composition or scheme is not confirmed, the Official Assignee shall apply to the court to adjudicate the debtor a bankrupt and the court may so adjudge him without any further notice to him. In view of the specific provisions in the Act and the rules, the debtor contends that he must be given the chance to submit a proposal for the composition or scheme of arrangement to his creditors before the court is empowered to adjudge him a bankrupt.

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Under s. 6(2) of the Act, once the debt of the petitioning creditor and the act or acts of bankruptcy complained of have been proved to the satisfaction of the court, a receiving order will be made in pursuance to the petition. In this case all the requirements have been fulfilled and pursuant to para 1 of the petition, I am empowered to make a receiving order against the debtor. Under r. 150(1) when a receiving order has been made, any creditor or the Official Assignee may apply to the court to adjudge the debtor bankrupt. In this case the judgment creditor orally applied to have the debtor adjudged a bankrupt and I had in deference to the debtor's objection adjudged him so as s. 15(1) and r. 150(2) do not prohibit me from making such an adjudication order. These provisions merely set out the procedures to be followed after a receiving order has been made and they are merely the administrative acts of the Official Assignee and have nothing to do with the jurisdiction of the court to adjudicate a debtor a bankrupt under r. 150(1) on the oral application of the judgment creditor, following the making of a receiving order on him.

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Adjudication order means merely a declaration of bankruptcy will be vested on the RO upon adjudication order made.

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[5] Reply by counsel for the judgment debtor

1. *Res judicata* does not apply because it is in the same proceeding and this is an issue of law raised and appealed.
2. In bankruptcy proceeding even at the hearing of the creditor's petition the court has the power to go behind the judgment.
3. The law is clear that the debt of the proof as at the date of the receiving order.
4. Affidavit filed in the course of submission must be discarded.

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A [6] Findings And Decision

1. I agree entirely with the submission of counsel for the appellant that it is incumbent upon the senior assistant registrar to require proof of the debt owed and of the act of bankruptcy. This is set up clearly in s. 6 of the Bankruptcy Act 1967 which read as follows:

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6. Proceedings and order on creditor's petition

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(1) A creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts, and shall be served as prescribed.

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(2) At the hearing the court shall require proof of:

(a) the debt of the petitioning creditor; and

(b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, some one of the alleged acts of bankruptcy; and

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(c) if the debtor does not appear, the service of the petition,

and if, satisfied with the proof may make a receiving order in pursuance of the petition.

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(3) If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy or of the service of the petition, or is satisfied by the debtor that he is able to pay his debts, or that for other sufficient cause no order ought to be made, the court may dismiss the petition.

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(4) When the act of bankruptcy relied on is non-compliance with a bankruptcy notice to pay, secure or compound for a judgment debt, the court may if it thinks fit stay or dismiss the petition on the ground that an appeal is pending from the judgment.

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(5) Where the debtor appears on the petition and denies that he is indebted to the petitioner, or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the court, on such security, if any, being given as the court may require for

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payment to the petitioner of any debt which may be established against the debtor in due course of law and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as may be required for trial of the question relating to the debt.

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- (6) Where proceedings are stayed the court may, if by reason of the delay caused by the stay of proceedings or for any other cause it thinks just, make a receiving order on the petition of some other creditor, and shall thereupon dismiss, on such terms as it thinks just, the petition in which proceedings have been stayed as aforesaid.

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- (7) A creditor's petition shall not after presentation be withdrawn.

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2. It is pertinent to note that under sub-section (5) if the debtor appears at the petition, he is required to deny the indebtedness before the senior assistant registrar could act to stay all proceedings for such time as may be required for trial of the question relating to the debt. In the proceeding before the senior assistant registrar it is clear all the judgment debtor did was to submit the notice under r. 117 to oppose the creditor's petition by stating therein that she was disputing the debt and the act of bankruptcy without condescending to any particulars. The act of bankruptcy it is to be noted had been brought about under s. 3(1)(i) of the Act on account of the judgment debtor failing to satisfy the bankruptcy notice on the judgment debt that the creditor had obtained from a court of law. A judgment of the court for all intent and purposes is conclusive of the debt owed to the judgment creditor. It follows that in the absence of any evidence that those sums were not owed the senior assistant registrar was entitled not to stay the proceeding under s. 6(5). She was entitled to find that the sum of RM10,225.753.42 was due and owing by the judgment debtor and that by the judgment debtor's failure to satisfy the bankruptcy notice after the expiry of seven days, an act of bankruptcy had been committed by the judgment debtor.

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- A 3. Having found that an act of bankruptcy had been committed the senior assistant registrar was entitled to make the receiving order and the adjudicating order as she had done. I would accept as authority the judgment of Siti Norma Yaakob cited by counsel as good law.
- B 4. I accept the submission by counsel for the judgment creditor that the proof of debt had been provided by the bankruptcy notice itself which alluded to the judgment obtained from the court.
- C 5. With respect to the contention of counsel for the judgment debtor that the affidavit verifying the petition must be annexed with the creditor's petition, I would respectfully disagree with the judgment of Edgar Joseph Jr J in *Ooi Thean Chuan v. Banque Nationale de Paris* [1992] 2 CLJ 1225; [1992] 3 CLJ (Rep) 160. In my view it is the substance not the form that matters. The purpose of Form 11 was merely to bring to the notice of the judgment debtor that the verifying affidavit had been annexed to the petition. If indeed the verifying affidavit and the petition had been brought to the notice of the judgment debtor that purpose had been achieved. A minor infraction (even if proven) does not in this case make the petition ineffective and bad.
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- F [7] The appeal is dismissed with costs.
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